

Members

Rep. David Wolkins, Chairperson
Rep. Matt Pierce
Rep. Trent Van Haaften
Rep. Ryan Dvorak
Rep. Ralph Foley
Rep. Cindy Noe
Sen. Richard Bray, Vice-Chairperson
Sen. Jeff Drozda
Sen. Victor Heinold
Sen. Anita Bowser
Sen. Timothy Lanane
Sen. Frank Mrvan



INTERIM STUDY COMMITTEE ON EMINENT DOMAIN

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MEETING MINUTES¹

Meeting Date: August 10, 2005
Meeting Time: 1:00 P.M.
Meeting Place: Indiana Government Center South Auditorium, 302 W. Washington St.,
Meeting City: Indianapolis, Indiana
Meeting Number: 1

Members Present: Rep. David Wolkins, Chairperson; Rep. Matt Pierce; Rep. Trent Van Haaften; Rep. Ryan Dvorak; Rep. Ralph Foley; Rep. Cindy Noe; Sen. Richard Bray, Vice-Chairperson; Sen. Jeff Drozda; Sen. Victor Heinold; Sen. Anita Bowser; Sen. Timothy Lanane; Sen. Frank Mrvan.

Members Absent: None.

Rep. David Wolkins, Chairperson of the Interim Study Committee on Eminent Domain (Committee), called the meeting to order at 1:07 p.m.

Rep. Wolkins stated he introduced House Bill 1063 concerning eminent domain during the 2005 session of the General Assembly. He said the introduced version of HB 1063 would have prohibited the taking of private property by eminent domain for commercial purposes. He stated the bill was amended in the House to prevent this acquisition if the owner of the property had rejected an offer for the property that was equal to the higher of at least

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

150% of the property's assessed value or the average of three appraisals of the property. He continued by stating the bill was amended in the Senate to prevent the transfer of property acquired by eminent domain for a commercial purpose unless there was a substantial likelihood that the acquisition of the property would promote the opportunity for employment or create business opportunities in a blighted area.

Rep. Wolkins said the final version of the bill, HEA 1063-2005, established the Committee to study the use of eminent domain, especially where the proposed use of the property being acquired by eminent domain does not relate directly to providing a governmental service or fulfilling a governmental responsibility but is, rather, a commercial use. He stated the Committee is also to study criteria that could be applied when the acquisition of property by eminent domain for a commercial use is proposed.

The first person to testify was Steven Anderson, Coordinator of the Castle Coalition of the Institute for Justice (Exhibit #1). Mr. Anderson stated the Castle Coalition was a nationwide network of grassroots activists committed to ending eminent domain abuse through outreach and activism. He stated that, in the wake of the United States Supreme Court's recent *Kelo v. City of New London* (Kelo) decision, the Hands Off My Home campaign was launched as an aggressive and focused initiative to effect real change in the use of eminent domain at the state and local level.

Mr. Anderson continued by stating the power of eminent domain is so awesome that, in the early days of this country, the United States Supreme Court described it as "the despotic power." He stated that reading the constitutions of the United States and the State of Indiana along with relevant case law plainly indicates that the Founding Fathers of the United States and the drafters of the Indiana Constitution were wary of eminent domain and committed to protecting private property rights.

Mr. Anderson said the crux of the issue is what constitutes a "public use" to justify the taking of private property through the use of eminent domain. He stated that, over the last 50 years, the notion of public use has expanded to the point that the public use restriction is no restriction at all. Mr. Anderson said governments in Indiana are growing more aggressive in the use of eminent domain powers.

Mr. Anderson continued by stating this erosion of rights was given ultimate approval in June in the Kelo decision. He said that "well paid lobbyists of developers and municipalities" will say that the Kelo decision does not affect Indiana and there is really no problem that needs fixing. He said these people are wrong because Kelo signifies a fundamental shift in the sanctity of property rights. He said under Kelo economic development is the only justification needed to condemn property.

Mr. Anderson stated the United States Supreme Court legitimized eminent domain for blight removal and urban renewal in 1954 in the case of *Berman v. Parker*. However, he said that over the last 50 years blight removal has come to mean everything but the common sense meaning of the term. He said that statutes in most every state, including Indiana's current eminent domain law, have such vague and amorphous definitions of blight that literally any property can be considered blighted and subject to being taken away.

Mr. Anderson said one thing the Court got right in Kelo was allowing states to enact their own property rights protections. He said there were several things the Indiana legislature could do to reaffirm the state's commitment to protecting private property. He said that legislation restricting eminent domain to "pure, historic public uses" could be enacted. He said that the legislature could explicitly prohibit "private-to-private" transfers of property for

economic development when that activity does not result in the transfer of land to public ownership, the transfer of land to a private entity that is a common carrier, the transfer of land to a private entity to remove a threat to public health or safety, or the lease of property to a private entity that occupies an incidental area within a public project. He said that the legislature could reform the way courts define public use by requiring that any determination of a public use be made by the courts and any claim of public use be shown by clear and convincing evidence.

Mr. Anderson concluded by stating Indiana's redevelopment laws, specifically IC 36-7 of the Indiana Code, could be amended to make sure "blighted area" means something objective and not what the government pays a consultant to say.

In response to questions from Committee members, Mr. Anderson said an amendment to the Indiana Constitution to deal with eminent domain issues would be better than amending Indiana statutes. However, he said he realized it would be more difficult to amend the state constitution and the legislature could deal with these issues through statutory changes. He also said the definition of "just compensation" should include more subjective elements and more accurately reflect the true value of property. He stated he was not opposed to governments engaging in economic development, but economic development occurs all across the country without the use of eminent domain.

Rep. Wolkins then said that, during the 2005 session, the term "blighted area" in IC 36-7-1-3 of the Indiana Code was changed to "area needing redevelopment." He said that the definition was still the same. He said under IC 36-1-7-3, an area needing redevelopment "means an area in which normal development and occupancy are undesirable or impossible because of...lack of development...cessation of growth...deteriorated or deteriorating improvements...character of occupancy...age...obsolescence...substandard buildings...or... other factors that impair values or prevent a normal use or development of property."

The next person to testify was Samuel R. Staley, Ph. D., Director of Urban and Land Use Policy at the Reason Foundation and Adjunct Scholar at the Indiana Policy Review Foundation (Exhibit #2). Dr. Staley said the United States Supreme Court in *Kelo* left the door wide open for states and cities to use eminent domain for a wide range of purposes. He said that, in essence, the Court said that public use could be anything the majority of a local government body considered important to the public health and welfare.

Dr. Staley said he was not convinced eminent domain was that important to economic development. He said that a number of alternatives to using eminent domain for purposes of economic development exist, including market price purchases of land, phasing development to accommodate properties at different times in the development cycle, purchasing easements or options for future development, lowering taxes, lowering regulatory barriers, streamlining planing, zoning, and permit approvals, providing public infrastructure in a timely and efficient manner, mediating land disputes or acquisitions among private property owners, and providing loans, grants, and tax incentives.

Dr. Staley then suggested four guidelines that should be taken into consideration when eminent domain is used. First, he said eminent domain should only be used when the public would benefit from access to a service or facility and the private sector cannot provide the service or facility even though significant benefits will accrue to the community through its development. Second, he said eminent domain should be used only as a tool of last resort and not just another tool for economic development. Third, he said eminent domain should properly be used if the public health and safety are endangered by the current use of property and its seizure would materially reduce the danger. Fourth, he

stated any private benefits should only be incidental to projects involving the use of eminent domain.

In response to questions from Committee members, Dr. Staley said he felt there were few economic development projects where the use of eminent domain was essential for the projects to go through. He stated just about any economic development project could be accommodated by the use of other means. Dr. Staley also stated that there were risks for governments in acquiring property through eminent domain to transfer to private developers. He said that, even if a development agreement is in place, sometimes those agreements fall through and a government could "get stuck" holding a piece of property for which they have no use. Dr. Staley also said he did not have any specific recommendations for amending language in the Indiana Code, but was willing to submit recommendations to the Committee later.

The next person to testify was Matt Brase from the Indiana Association of Cities and Towns (IACT) (Exhibit #3). Mr. Brase said eminent domain was a rarely used government ability provided by the United States Constitution that lets governments acquire property with just compensation and relocation expenses provided to property owners. Mr. Brase said eminent domain may only be used for the public good, with stringent review and public input, and, in Indiana, the condition of blight must first be found.

Mr. Brase continued by stating eminent domain has helped elected leaders to serve all members of the community by building roads, laying sewer lines, and creating economic development. He stated IACT supports changes to Indiana law that would further protect property owners and that would not hinder creating jobs and a strong economy.

Mr. Brase then introduced Mayor Jeff Rea from Mishawaka. Mayor Rea said he had been mayor for 18 months, but he had worked more than 11 years with the city. He said much of that time he was involved in economic development and redevelopment projects.

Mayor Rea said cities and towns in Indiana use eminent domain sparingly and responsibly and follow procedures and guidelines that are already set out in state law. He stated that, as a mayor, he was responsible for protecting property rights while also removing blighted areas and providing for economic development.

Mayor Rea said he felt the Kelo decision had been misrepresented. He said Kelo did not create additional powers for governments to use eminent domain. He said, in Indiana, the "finding of blight" requirement means governments could not take away private property at random.

Mayor Rea concluded by stating cities and towns were willing to work with the Committee and "find common ground" concerning amendments to eminent domain laws.

In response to questions from Committee members, Mayor Rea said Mishawaka acquired 60 properties to allow AM General Corporation's "Hummer 2" project to be built. He said eminent domain was not used to acquire any of the properties, but the availability of eminent domain was necessary to come to agreements with some property owners. He said while he did not object to fair compensation, one property owner affected by the project was asking \$1 million for property appraised at not more than \$50,000.

Mayor Rea said that, as an elected official, he did not want people living in fear of their government and was willing to look at "tightening up" definitions in the eminent domain laws, including the definition of blight. He also said it was "not a good business practice" for a mayor to use an economic development project to bring in a new business that runs a

long time local business out of town or out of business.

Mayor Rea also said that when the state takes a person's private property, in addition to receiving fair market value for the property, the person also receives relocation benefits. He said federal law provided these relocation benefits must be paid up to \$25,000. He said he thought most persons affected by the AM General project received the full \$25,000.

The next person to testify was Angie Bixler from the Association of Indiana Counties (AIC). Ms. Bixler said LaPorte County had recently adopted a resolution to prohibit any part of county government from using eminent domain for private commercial development. She said the resolution would be discussed in more detail later by Shaw Friedman. She stated that an initial polling of AIC members found that, while a few members had concerns about current eminent domain laws, most members felt eminent domain should be a tool available to local governments. She said the AIC would work with the Committee on eminent domain issues.

Rep. Wolkins then recessed the Committee for a break from 2:47 p.m. to 2:56 p.m.

After reconvening the Committee, Rep. Wolkins stated the Committee would hear comments from the public.

The first person to speak was Shaw Friedman, LaPorte County attorney (Exhibit #4). Mr. Friedman said the LaPorte County commissioners were concerned over the Kelo decision. He said LaPorte County was one of the first, if not the first, governmental entity in Indiana to formally adopt a resolution (Exhibit #5) criticizing the Kelo decision and formally renouncing any new authority the decision might provide to county government to take private property for commercial development.

Mr. Friedman stated that while LaPorte County government is active in the business of economic development and job creation, LaPorte County was also in the business of trying to bring willing sellers and willing buyers together. He said the resolution makes it clear that no branch of LaPorte County government will be allowed to use eminent domain to forcibly acquire private property for private commercial development.

Mr. Friedman continued by stating that another part of the resolution asks for the legislature to take reasonable steps to put limitations on the power of eminent domain in Indiana. He stated that even the United States Supreme Court in Kelo made clear that "nothing in the opinion precludes any state from placing further restriction on the exercise of the taking power."

The next person to speak was Don Strietelmeier from Hope, Indiana. He stated eminent domain should only be used when it's necessary for a public use and should not be used for private development. He also stated fair market value did not provide adequate compensation to private property owners.

The next person to speak was Mike Sylvester from Fort Wayne, Indiana, and chairperson of the Allen County Libertarian Party. He stated that there had been several examples of eminent domain abuse in Fort Wayne, including the abuse of the statutory definition of "blight." He said the City of Fort Wayne seized Belmont Beverage, a downtown liquor store, to make room for a new convention hotel, but plans changed. He said Fort Wayne now wants to build the hotel on the site occupied by Cindy's Diner. He said it had cost Fort Wayne \$1 million to obtain the Belmont liquor store site and now "they don't know what they'll use it for."

The next person to speak was Dr. William Scott from Bloomington, Indiana. Dr. Scott said he had been "dismayed to hear apologists for the unlimited government power of seizing private property." He said 16 states were considering making statutory changes to limit government authority to seize private property and six states were considering constitutional amendments to do so. He recommended that the State of Indiana should do both. He also said blight could be reduced without taking away property rights.

The next person to speak was Scott Stebbins from Logansport, Indiana. He stated he supported limiting eminent domain or doing away with it. He said more control was needed on governments' ability to take private property.

The next person to speak was Steve Yoder from Logansport, Indiana. He stated it was crucial for local planning commissions to become more involved with the community. He said that while he supported local planning commissions engaging in economic development projects, these commissions have to do a better job explaining their economic development plans to the public.

Rep. Wolkins then read a statement submitted by Michael and Amy Kalscheur from Indianapolis, Indiana. He said their comments were that eminent domain should only be used when absolutely necessary and only for a public use and that property should never be taken from one private owner and sold for another private use.

The next person to speak was Mike Kole from Fishers, Indiana, and Libertarian Party candidate for Secretary of State. He stated that home ownership was the American Dream and that Americans assumed "your home is your castle." He said private property owners felt threatened by the Kelo decision. He said legislation should be passed to ban the use of eminent domain for commercial takings.

The next speaker was Bob Kraft from Indiana Farm Bureau. He stated that, with very few exceptions, eminent domain should not be used to condemn the property of one private person to give it to another private person. He said that eminent domain should not be used just to increase tax revenues. He also stated that, for purposes of eminent domain laws, agricultural land should be considered as developed land for a productive use, if property is taken by a government and not used for a specific length of time, the private owner should have a "right of first refusal" to regain ownership of the property, and governmental entities should have the authority to replace property with property and not just compensate property owners with money.

Rep. Wolkins then read a statement submitted by David Dessauer from Indianapolis. He said his comments were that it seems the Kelo case violates the clause in the constitution that guarantees a republican form of government because nobody voted for the people that said private use equals public use.

The next speaker was Susan Easterday from Indianapolis. She said eminent domain laws should be made fairer. She said it was a great emotional and financial hardship to be forced to move via eminent domain. She continued by saying property owners needed to be treated fairly. She said she owned property on the near south side of Indianapolis that was to be used as part of the new Colts stadium complex. She said she had been insulted by the below appraised value offer she had received for the property.

Next to speak was Linda Elliot from Indianapolis. She said she had been threatened with eminent domain concerning property she owned that was within the footprint of the Colts stadium parking lot. She said the offer she received for the property would not cover her relocation expenses if she did not have another place to go. She said she was not trying to

get rich but only wanted to be treated fairly.

The next speaker was Mary Kay Besso from Indianapolis. She stated eminent domain was unfair and unconstitutional and should be eliminated for purposes of economic development.

The next speaker was Clark Kahlo from Indianapolis. He stated he was surprised nobody had yet used the term "corporate welfare" when describing the use of eminent domain for private economic development. He said "sweetheart deals" between local and state politicians and developers are a threat and a reality. He stated eminent domain for necessary public purposes is appropriate, but the Kelo decision went too far. He said the state should legislate appropriate restraints and limitations. He also stated the corporate counsel for the City of Indianapolis had been present at the meeting until members of the public started to speak.

The next person to speak was Lisa Stewart from Indianapolis. She said she supported a constitutional amendment along with statutory changes to address eminent domain issues. She stated she lived on a river and was concerned with development in floodplains. She said the environmental aspects of development and land use were not fully considered when areas are redeveloped. She said developers should stay away from areas of the state that are sensitive and prone to disasters such as flooding.

The next speaker was Rick Hurst from the N.K. Hurst Company in Indianapolis. He said his company was a family owned dried bean business that was also located in the footprint of the Colts stadium project. He stated he had been in discussions with the City of Indianapolis concerning the stadium project and had received two appraisals from the State of Indiana. He said the appraisals did not equal the market value or the replacement value of his business. Mr. Hurst stated his business was unique and he has been unable to find an adequate location anywhere in Indianapolis to match his current location.

In response to questions from Committee members, Mr. Hurst stated because his facility was so unique, there were no similar facilities to compare it to for purposes of appraising its value. He said the current statutes did not take replacement costs into account for purposes of appraising unique situations like his. He also stated he was not against the new stadium and currently went to Colts games and hosted tailgate parties on the grounds of his business. He said he just wanted to be made whole, to stay in business, and to stay in Indiana.

Rep. Wolkins then presented a letter to the Committee submitted by Eric Miller from Advance America (Exhibit #6). He said the letter stated Advance America supported strengthening the eminent domain laws of the State of Indiana to help protect persons that own private property. He said the letter goes on to say that, in view of the Kelo decision earlier this summer, it is vitally important that Indiana strengthen its eminent domain laws to help prevent the taking of private property by local or state government for private use.

The final speaker was Don Robinson from Morgan County. He said he did not think it was right that if he robbed a bank, the government would provide him with legal counsel, but if the government wanted to take his house, he was on his own.

Rep. Wolkins then asked if there was any Committee discussion.

Rep. Noe said Mr. Hurst was one of her constituents. She stated she had no idea how Mr. Hurst could be made whole. She said that, in considering changes to eminent domain

laws, the Committee should also focus on situations like that.

Rep. Pierce said he did not want local governments to use eminent domain to help private developers. He said the Committee should also look further into the eminent domain process even when it's used for a legitimate public purpose. He also questioned the need to use eminent domain to facilitate certain telecommunications providers because of increased competition in that area. He also questioned if it would be a proper use of eminent domain to construct the proposed I-69 extension and then turn all or part of it over to a private company to operate a toll road.

Sen. Drozda stated that since so many comments had been made at the meeting about the Colts stadium and convention center expansion project that representatives from the City of Indianapolis should be invited to testify at a future meeting. Rep. Pierce stated that, since the stadium and convention center building authority is a state entity, representatives from the Governor's office should also be invited to discuss the project.

Rep. Wolkins then distributed a document (Exhibit #7) to Committee members that contained possible changes to eminent domain laws and additional items to consider. He said the options included defining "public use" and allowing eminent domain only for public use, defining "blighted" and allowing eminent domain only for blighted areas, defining "economic development" and restricting the use of eminent domain for economic development, prohibiting eminent domain for private businesses, allowing eminent domain only as a last resort and paying the property owner 150% above the property's highest market value, allowing eminent domain only in the case of imminent public endangerment, setting time limits on how long property seized by eminent domain may be held by a government before it develops the property or loses its rights in the property, and eliminating the eminent domain law altogether.

Rep. Wolkins said the additional items to consider included the "land swap in lieu of cash" idea, how to deal with businesses that rent buildings on seized property, how to deal with lost business revenue because of location changes, how to deal with seized land that is not used, and whether or not a premium should be paid to property owners any time eminent domain is used.

Rep. Wolkins also stated the document contained a website address, www.emdo.blogspot.com, that contains information on eminent domain activities around the country.

Rep. Wolkins said the Committee would meet in September and October. He said more public comments would be taken at the September meeting.

Rep. Wolkins adjourned the meeting at 4:29 p.m.